Supreme Court, U. S.
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80-548

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No.

THE PEOPLE OF THE STATE OF MICHIGAN,

Petitioner,
vs.

HERMAN RANDLE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

TO THE COURT OF APPEALS OF THE

STATE OF MICHIGAN

WILLIAM L. CAHALAN
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QUESTION PRESENTED

IS EVIDENCE OF OR COMMENT UPON THE DEFENDANT'S REFUSAL TO PROVIDE NON-TESTIMONIAL INFORMATION VIOLATIVE OF THE FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION?

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PETITION FOR A WRIT OF CERTIORARI

TO THE COURT OF APPEALS OF THE

STATE OF MICHIGAN

Now comes William L. Cahalan, Prosecuting Attorney in and for the County of Wayne, State of Michigan, by Edward R. Wilson, Principal Attorney, Appeals, and Timothy C. Scallen, Assistant Prosecuting Attorney, and prays that a writ of Certiorari issue to review the judgment of the Court of Appeals of the State of Michigan entered in the above-entitled cause on April 29, 1980, leave to appeal denied by the Michigan Supreme Court on July 23, 1980.

OPINIONS BELOW

The Opinion of the Michigan Court of Appeals, issued April 29, 1980, is unreported and appended as Appendix A. The Michigan Supreme Court denied leave to appeal in an order issued July 23, 1980 and appended as Appendix B.

STATEMENT OF JURISDICTION

The judgment of the Michigan Court of Appeals was issued on April 29, 1980. The Michigan Supreme Court denied Petitioner's application for leave to appeal on July 23, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257(3).

List of Parties to the Proceeding

Herman Randle, Respondent
Represented below by appointed counsel,
Alvin C. Sallen
201 Northland Towers East
Southfield, MI 48075
(313) 569-6060

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides as follows:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or

> naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF FACTS

Respondent was tried by jury and convicted on the charge of murder in the second-degree. In his opening statement defense counsel stated that after the incident the respondent left the scene, explaining he did not leave town but went over to his mother's house. He further stated that the respondent told everyone where he would be when he left the scene and that is where the police came and arrested him. (R. I, 83).

The arresting officer testified that after receiving information and a description of the respondent at the scene he proceeded to a certain apartment where he

found the respondent with others. The officer asked the respondent if he was Herman Randle to which the respondent answered with another name. The officer testified that after placing him under arrest, the respondent never admitted to him that he was in fact Herman Randle. (R. II, 36-37).

The Michigan Court of Appeals held, relying upon the holding of People v Bobo, 390 Mich 355 (1973) which was premised upon the Fifth Amendment, that testimony by the arresting officer that respondent gave a false name before his arrest and then refused to give a name after he was arrested violated the respondent's constitutional right to remain silent.

REASONS FOR GRANTING THE WRIT

The issue as to whether evidence of or comment upon a defendant's refusal to provide non-testimonial information violates the Fifth Amendment is an issue which has split several of the federal circuits, several state courts of last resort, consequently has caused a split between federal circuits and state courts and which has once before been before this Court (though the question was not reached). Schmerber v California, 384 US 755, 765 n. 9, 86 S Ct 1826, 1833 n. 9, 16 L Ed 2d 908 (1966).

The Second Circuit has held that such evidence does not violate the Fifth Amendment. In Welch v District Court of Vermont Unit, Ect., 594 F 2d 903 (CA 2, 1979), the defendant appealed from a denial of a petition for writ of habeas corpus on the claim that the admission into evidence of his refusal to take a breath test at his trial on the charge of driving while intoxicated violated his privilege against self-incrimination. In finding this contention to be of no merit, the Court held:

This issue was raised in Schmerber but the Court did not resolve it because defense counsel in that case had failed to object at trial to the admission of the refusal evidence or the prosecutor's comments on that evidence. 384 U.S. at 765 n.9, 86 S.Ct. 1826, 1833 n.9. The Court did note that "general Fifth Amendment principles, rather than the particular holding of Griffin [v. California, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965)], would be applicable in these circumstances." Id., citing Miranda v. Arizona, 384 U.S. 436, 468, n.37, 86 S.Ct. 1602, 16 L.Ed2d 694 (1966). The Supreme Court also held that the State "may have to forgo the advantage of any testimonial products of administering the test," such as incriminating statements or confessions made by the accused out of fear of the process of extracting physical evidence from his body or out of religious opposition to the test. 384 U.S. at 765 n.9, 86 S.Ct. at 1833 n.9 (emphasis in original).

There is no claim in this case that Welch refused out of fear of any "pain, danger, or severity" associated with the breath test, id., or that he opposed the test on religious grounds. Nor did he "confess" when faced with the threat of a compelled test. Although the evidence introduced constituted more than a mere "No" on the part of Welch, and included not only vague and contradictory answers but also a request for the presence of a third party witness if he should submit to the test, he did not give a reason for his refusal or actually make an incriminating statement to the effect that he was drunk. His only claim, therefore, is that the very act of refusal was itself testimonial in nature.

> We have already rejected a similar claim in the area of handwriting exemplars, holding in United States v. Wolfish, 525 F.2d 457, 461 (2d Cir. 1975) (per curiam), cert, denied, 423 U.S. 1059, 96 S. Ct. 794, 46 L. Ed.2d 649 (1976), that it was not error to admit evidence of the defendant's refusal to cooperate in giving a handwriting exemplar, including his efforts to disguise his handwriting in the exemplar.

Consistent with this view, see also United States v Blakney, 581 F2d 1389 (CA 10, 1978), United States v Nix, 465 F2d 90 (CA 5, 1970), Clark v State, 379 So 2d 97 (Fla., 1979), Hill v State, 366 So 2d 318 (Ala., 1979), People v Thomas, 385 NE 2d 584 (N.Y., 1978) and City of Westerville v Cunningham, 239 NE 2d 40 (Ohio, 1968) all of which opinions are primarily based upon Schmerber, supra. Many federal circuit and state courts, however, take or indicate a sharply opposing view. Leake v Cox, 432 F2d 982 (CA 4, 1970) (assumed without deciding such evidence was inadmissable citing Schmerber, 384 US 755, 765 n. 9, 86 S Ct 1826, 1833 n.9, 16 L Ed 2d 908 (1966), United States v White, 355 F2d 909 (CA 7, 1966), State v Andrews, 212 NW 2d 863 (Minn., 1973), State v Adams, 247 SE 2d 475 (W. Va., 1978), Dudley v State, 548 SW2d 706 (Tex., 1977) and State v Oswald, 241 NW 2d 566 (S.C., 1976) (indicating agreement with Andrews but not having to go that far). The holding of the Supreme Court of Minnesota in Andrews, supra is in direct conflict, both factually and legally, with that of the Second Circuit in Welch, supra.

Additionally, the Ninth and Seventh Circuits are split as to whether Miranda warnings are required before admitting evidence of voice or handwriting exemplars. United States v Thomas, 586 F2d 123 (CA 9, 1978) and United States v Cassell, 452 F2d 533 (CA 7, 1971).

It is patently clear that divulgence of one's name, like voice exemplars and the like, is not a testimonial communication protected by the Fifth Amendment. United States v Prewitt, 553 F2d 1082 (CA 7, 1977) (alias), People v Davis, 17 Mich App 615 (1969). The Michigan Court of Appeals in the instant case, in holding that evidence of the respondent giving a wrong name and his subsequent refusal to divulge his true name or remaining silent on that as violative of his Fifth Amendment privilege against self-incrimination, subscribed to the view of White, Andrews and others that evidence of the respondents refusal to provide non-testimonial information violates the Fifth Amendment.

There is unquestionably a split between and among federal circuit and state courts and seemingly divergent opinions as to the significance of this Court's statement in footnote 9 in Schmerber. However, petitioner submits that the view that evidence of refusing to provide non-testimonial information violates one's Fifth Amendment rights is a wholly unwarranted application and extension of the Fifth Amendment. The Court has consistently and squarely defined the Fifth Amendment privilege as protecting "an accused only from being compelled to testify against himself or otherwise provide the State with evidence of testimonial or communicative nature . . ." Schmerber, 36 S Ct 1830. Evidence or comment upon the defendant's refusal to provide non-testimonial information, which he had no right to do, does not in any manner violate his privilege against incriminating himself or provide the State with testimonial evidence. To hold otherwise, especially here where the defendant claimed in his opening statement that he made himself readily available to the police at all times, would serve no useful purpose and would be purely a fanciful and unwarranted application of the Fifth Amendment privilege against self-incrimination.

There being a split between and among federal circuit and state courts as to the scope and application of the Fifth Amendment, petitioner submits that plenary review by this Court is needed.

CONCLUSION

It is respectfully submitted that for the reasons outlined above plenary review should be granted.

Respectfully sutmitted,

WILLIAM L. CAHALAN
Prosecuting Attorney
Wayne County
State of Michigan

EDWARD REILLY WILSON
Principal Attorney, Appeals

Timothy C. Scallen

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TCS/do

Dated: September 18, 1980.

APPENDIX A

OPINION OF THE MICHIGAN COURT OF APPEALS,

(People of the State of Michigan v Herman Randle)

(No. 43317)

Before: N.J. Kaufman, P.J., D.E. Holbrook, Jr. and R.M. Maher, JJ.

PER CURIAM

The defendant, Herman Randle, was convicted of second-degree murder in violation of MCL 750.317; MSA 28.549 in a jury trial in the Recorder's Court for the City of Detroit that lasted from July 25 through July 28, 1978. Defendant was sentenced to serve the rest of his natural life in prison. The defendant appeals as of right, raising five challenges to his conviction. This Court need only address one challenge since we find that challenge dispositive of the present appeal.

The prosecution's case against the defendant was based upon eyewitness testimony of several witnesses who observed the defendant severely beat the deceased, Delores Butler. The defendant and the deceased had apparently been living as man and wife for several years. The cause of the deceased's death was established to be a torn liver and mesentery. Prosecution witnesses testified that the defendant had beaten the deceased, thrown her down a flight of stairs, and kicked the deceased in the abdomen. The defendant testified in his own behalf and admitted to having hit the deceased about the face after learning of the deceased's infidelity. However, the defendant denied ever kicking the deceased and claimed that she had fallen down a flight of stairs due to her intoxication.

While examining a police officer who had arrested the defendant after this incident, the prosecutor asked the officer if the defendant had given the officer his correct name after he had been arrested. The officer stated that before his arrest, the defendant had given a false name and that after his arrest, the defendant still did not give his correct name, but remained silent on this issue. We view this as improper examination invading the defendant's self-incrimination rights as established by People v Bobo, 390 Mich 355 (1973). In Bobo, the Supreme Court held:

"We will not condone conduct which directly or indirectly restricts the exercise of the constitutional right to remain silent in the face of accusation. 'Non-utterances' are not statements. The fact that a witness did not make a statement may be shown only to contradict his assertion that he did."

See also, People v Hoye, 80 Mich App 258, 262; 263 NW2d 343 (1977) and People v Perez, 66 Mich App 685; 239 NW2d 432 (1976).

Defense counsel's failure to object does not preclude appellate review. People v Dunn, 46 Mich App 226; 208 NW2d 239 (1973), People v Gant, 55 Mich App 510; 222 NW2d 784 (1974), People v Hargrave, 74 Mich App 690; 254 NW2d 614 (1977).

In Hargrave and Hoye, supra, this Court found prosecutorial cross-examination and/or argument concerning defendant's silence to be "offensive to the maintenance of a sound judicial process". We find this to be true of the direct examination of the arresting police officer in the case at bar. To allow the prosecutor to use the silence of the accused against him placed an impermissible penalty upon the exercise of the defendant's privilege against self-incrimination. We also find the people's proofs were not so overwhelming to offset the prejudicial effect of this testimony. Though unobjected to at trial, the error could not have been cured by a cautionary instruction and therefore constitutes grounds for reversal. We wish to reiterate a warning given by this Court several years ago:

"In finding the error harmless in this case, we wish to emphasize that we do not condone conduct which directly or indirectly restricts or penalizes the exercise of the constitutional right to remain silent in the face of accusation. People v Bobo, 390 Mich 355; 212 NW2d 190 (1973). We will find it difficult in the future to believe that prosecutors and police are ignorant of the well-established principle of law which forbids comment upon an accused's silence or that clear violations of the principle arise from inadvertence. Deliberate violations of this rule may lead us to reverse convictions even where evidence might be overwhelming. The prosecutor who comments, or elicits comment, on a defendant's silence thus risks the loss of a perfectly good case for no reason."

For the above reason, the defendant's conviction is vacated and the case is remanded to the lower court for a new trial.

APPENDIX B

ORDER OF THE MIICHIGAN SUPREME COURT

At a Session of the Supreme Court of the State of Michigan, Held at the Supreme Court Room, in the City of Lansing, on the 23rd day of July in the year of our Lord one thousand nine hundred and eighty.

Present: The Honorable Mary S. Coleman, Chief Justice, Thomas Giles Kavanagh, G. Mennen Williams, Charles L. Levin, John W. Fitzgerald, James L. Ryan, Blair Moody, Jr., Associate Justices.

On order of the Court, the application for leave to appeal is considered, and it is DENIED, because the Court is not persuaded that the question presented should be reviewed by this Court.

State of Michigan — ss.

I, Harold Hoag, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 23rd day of July in the year of our Lord one thousand nine hunderd and eighty.

/s/ Corbin Davis
Deputy Clerk

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Respondent.

MOTION TO PROCEED IN FORMA PAUPERIS

Now comes Respondent Herman Randle, by and through his attorney, Alvin C. Sallen, and pursuant to Rule 46, respectfully moves this Honorable Court to enter an Order allowing him to proceed In Forma Pauperis in the above-captioned cause for the following reasons:

1. That Respondent is presently incarcerated, awaiting retrial in the Recorder's Court for the City of Detroit.

2. That Respondent's retrial has been stayed pending Plaintiff-Petitioner's Application for a Writ of Certiorari.

3. That Respondent was represented in this cause by Court-appointed counsel, Alvin C. Sallen, in the Michigan Court of Appeals and the Michigan Supreme Court.

4. That Respondent is still indigent and has no monies or assets to retain counsel or pay any costs for any proceedings in this Court.

Wherefore, Respondent prays this Honorable Court enter an Order allowing him to proceed In Forma Pauperis.

Respectfully submitted,

Alvin C. Sallen (P23797)
Attorney for Respondent
201 Northland Towers East
Southfield, Michigan 48075
(313) 569-6060

Dated: January 7, 1981

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

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Petitioner,

vs.

HERMAN RANDLE,

Respondent.

ANSWER IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MICHIGAN

ALVIN C. SALLEN (P23797)
Attorney for Respondent,
HERMAN RANDLE
201 Northland Towers East
Southfield, Michigan 48075
(313) 569-6060

COUNTER-QUESTION PRESENTED

MAY A STATE AS A MATTER OF ITS OWN LAW IMPOSE HIGHER STANDARDS ON POLICE ACTIVITY AND PROSECUTORIAL CONDUCT WHICH DIRECTLY OR INDIRECTLY RESTRICTS THE EXERCISE OF THE CONSTITUTIONAL RIGHT TO REMAIN SILENT AS GUARANTEED BY THE CONSTITUTION OF THE STATE OF MICHIGAN, ART 1, §17?

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Respondent.

ANSWER IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MICHIGAN

Now comes Respondent Herman Randle, by and through his attorney, Alvin C. Sallen, and prays this Honorable Court deny Petitioner's Writ of Certiorari for the following reasons:

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides as follows:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article 1, Section 17 of the Michigan Constitution provides in pertinent part:

"No person shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law."

COUNTER-STATEMENT OF FACTS AND PROCEEDINGS BELOW

This is a criminal case.

Respondent Herman Randle was charged with the offense of Murder in the Second Degree, MCLA 750.317; MSA 28.549.

The case was tried before a duly sworn jury before the Honorable Verne C. Boewe, a Visiting Judge of the Recorder's Court for the City of Detroit (I, 68).

Respondent was charged with the murder of his common-law wife, Delores Butler.

In a nutshell, the prosecutor's theory was that on December 22, 1977 the Respondent came home from a period of incarceration in the Detroit House of Correction to find his home in a state of disarray. The Respondent was told that while he was gone his wife was sleeping with other men. The Respondent confronted the deceased with this information and then proceeded to viciously beat and kick her, causing her eventual death.

Thirty-one year old Herman Randle testified in his own behalf (III, 93-122; IV, 3-66). He testified that upon being told by his one-time friend, Ralph Weathington, that his wife had slept with his friend and everyone in the neighborhood (III, 105), he felt blown up inside and severely hit his wife in and about the face. The Respondent denied ever kicking his wife in the stomach and stated that she was drunk and stumbled down the staircase

(III, 112-133). His wife was alive with swollen eyes when he left her. The Respondent denied any previous convictions for any violent crime.

The medical examiner, George Russanow, stated that the cause of death was internal bleeding caused by a ruptured liver. The liver could have been ruptured by the fall down the flight of stairs (I, 97-99, 101-105). The deceased's blood alcohol level was .17 (I, 101, 102). The various contusions to the deceased's head were not the cause of her death (I, 111, 112).

On July 28, 1978, Respondent was found guilty of second-degree murder (V, 20).

On August 11, 1978 he was sentenced to a natural life term of imprisonment (4, Sentence Proceedings).

On April 29, 1979, the Court of Appeals, Judge N. J. Kaufman presiding, rendered its Opinion (unreported), which vacated Respondent's conviction and remanded his case for a new trial.

On July 23, 1980 the Michigan Supreme Court issued an Order denying Petitioner's leave to appeal.

It is of significant import to note that the Court of Appeals only addressed itself to one of the five challenges raised in the appeal Brief submitted by Respondent. Respondent Randle respectfully submits that the four remaining issues also warrant reversal and remand, and are salient reasons for this Court to deny Certiorari (see Respondent's Brief appended as Appendix A).

REASONS FOR DENYING CERTIORARI

1. Respondent raised five issues on appeal to the Michigan Court of Appeals, each of which it is submitted, warrant reversal of his conviction. It is of significant import to note that the Court of Appeals in its Opinion only addressed itself to one of the issues raised by Respondent. Respondent again raised

all five challenges to his conviction in his Answer and Brief in Opposition to the prosecution's Application for Leave to Appeal to the Michigan Supreme Court. On July 23, 1978 the Michigan Supreme Court denied the Application for Leave to Appeal because it was not persuaded that the question presented by the appellant should be reviewed.

2. Petitioner is misplaced in its attempt to characterize the Court of Appeals Opinion, which reversed Respondent's conviction, as being solely premised on "evidence of or comment upon the Defendant's refusal to provide non-testimonial information in violation of the Fifth Amendment privilege against self-incrimination". Perusal of the authorities set forth in the Michigan Court of Appeals Opinion actually reveals that it was not only premised upon the violation of Federal constitutional rights but also constitutional rights as guaranteed under the State Constitution, Mich Const, 1963, Art 1, §17 and case law as promulgated by the State, which as a matter of State policy, proscribes both the prosecutor and police from commenting upon an accused's silence in the face of accusation. People v. Bobo, 390 Mich 355; 212 NW2d 190 (1973).

Defendant-respondent respectfully submits that there is no need to devolve into a hairsplitting and often sophistric analysis as to whether the complained-of conduct involves testimonial as opposed to non-testimonial conduct, because a state, as a matter of its own constitutional law, may impose higher standards on police and prosecutorial conduct than those federally required. See, e.g., Cooper v. California, 386 US 58, 62; 87 S Ct 788; 17 L Ed 2d 730 (1967); Sibron v. New York, 392 US 40, 60-61; 88 S Ct 1889; 20 L Ed 2d 917 (1968). See Oregon v. Hass, 420 US 714, 719; 95 S Ct 1215; 43 L Ed 2d 570 (1975).

The case at bar simply involves impermissible comment upon the fact that Respondent remained silent and did not give his

correct name after he was formally arrested and interrogated. This unwarranted comment was brought to the jury's attention by the prosecutor's interrogation of the arresting officer and in his final argument. The prosecutor's direct examination of one of the arresting officers reads as follows:

> Q. All right. Now, once you recognized or realized that it was Herman Randle, or that person sitting at the table was in fact Herman Randle, or matched the description from the clothes that he had on, what did you do?
>
> A. I placed him under arrest and advised him of his constitutional rights. I explained the situation to the people that were there because they were getting rather rowdy.
>
> Q. All right --
>
> A. And then we took him out to the car.
>
> Q. Now, did the Defendant ever admit to you that he was in fact Herman Randle?
>
> A. Did he ever admit it to me?
>
> Q. Yes.
>
> A. Not to me.
>
> MR. ZIOLKOWSKI: I have nothing further of this witness.
>
> (III, 36-37).

It is fundamental that an accused's Miranda rights (Miranda v. Arizona, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966) applies to all police interrogation once an accused indicates in any manner that he wishes to remain silent. Although the interrogation may be perfunctory and ask for general information, it nonetheless constitutes an interrogation. It is thus apparent that the People's attempt to characterize the improper conduct as "non-testimonial" finds neither factual nor logical support. In the first instance, the prosecutor, in his case-in-chief prior to the Defendant taking the stand, impermissibly brought to the jury's attention that Defendant did not "admit" he was Herman Randle after he was formally arrested and advised of his constitu-

tional rights. Secondly, the prosecutor directly argued to the jury in his closing argument that they should infer that the Defendant's refusal to give his name is indicative of his lack of remorse and criminal mens rea.

At his trial, when testifying on his own behalf, Randle was not asked by his counsel and did not volunteer any information as to whether he had initially given a false name to the police before his arrest and remained silent and still did not give his correct name after he was formally arrested and interrogation by the police had commenced.

In this context, it is manifest that the actual design and effect of the prosecutor's subsequent line of questioning of the arresting police officer indicating that the Defendant refused to speak during interrogation was to place a penalty upon Defendant's exercise of his privilege against self-incrimination. Inasmuch as Defendant on direct examination did not testify at all regarding his refusal to give his correct name when interrogated by the police there was no prior inconsistent statement to impeach.

In People v. Graham, 386 Mich 452, 458; 192 NW2d 255 (1971), the Michigan Supreme Court emphasized:

> "In our holding today, we stress that the defendant's refusal to speak during interrogation is admissible only to impeach his own prior inconsistent statements at trial."

Thus, in the case at bar, the Court of Appeals in vacating Defendant's conviction aptly noted:

> While examining a police officer who had arrested the defendant after this incident, the prosecutor asked the officer if the defendant had given his correct name after he had been arrested. The officer stated that before his arrest, the defendant had given a false name and that after his arrest, the defendant still did not give his correct name, but remained silent on this issue. We view this as improper examination invading the defendant's self-incrimination rights as established by People v. Bobo, 390 Mich 355 (1973). In Bobo, the Supreme Court held:

"We will not condone conduct which directly or indirectly restricts the exercise of the constitutional right to remain silent in the face of accusation. 'Non-utterances' are not statements. The fact that a witness did not make a statement may be shown only to contradict his assertion that he did".

As previously noted, it cannot be gainsaid that Petitioner has conveniently ignored the salient point that the prosecutor compounded this errant inquiry by emphasizing to the jury in closing argument that Defendant's choice to remain silent and not give his correct name after his arrest, should be considered as evidence of his lack of remorse and his criminal state of mind.

When scrutinizing the factual circumstances underlying Respondent's conviction, the Court of Appeals correctly noted that the People's proofs "were not so overwhelming so as to offset the prejudicial conduct" of the prosecutor.

Finally, it must be emphasized that the Opinion which vacated Defendant-respondent's conviction was premised not only upon the Michigan Constitution, Mich Const, 1963, Art 1, §17, but also upon State cases (People v. Bobo, supra; People v. Graham, supra; People v. Hoye, 80 Mich App 258, 262; 263 NW2d 343 (1977); People v. Hargrave, 74 Mich App 690; 254 NW2d 614 (1977) for the proposition that the direct examination of the arresting police officer in the case at bar was "offensive to the maintenance of a sound judicial process".

CONCLUSION

It is respectfully submitted that for the above reasons, as well as the points and authorities set forth in Respondent's Briefs previously filed in the Michigan Court of Appeals and the Supreme Court, this Court should deny Certiorari.

Respectfully submitted,

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DATED: December 29, 1980

STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

-vs-

HERMAN RANDLE,

Defendant-Appellee.

SUPREME COURT
NO. 65184

Court of Appeals No. 43317
Recorder's Court No. 77-09561

BRIEF IN SUPPORT OF ANSWER IN OPPOSITION
TO DELAYED APPLICATION FOR LEAVE TO APPEAL

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APPENDIX A

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STATEMENT OF FACTS AND PROCEEDINGS BELOW*

This is a criminal case.

Defendant-appellant HERMAN RANDLE was charged with the offense of Murder in the Second Degree, MCLA 750.317; MSA 28.549.

The case was tried before a duly sworn jury before the Honorable Verne C. Boewe, a visiting Judge of the Recorder's Court for the City of Detroit (I, p. 68).

Defendant was charged with the murder of his common-law wife, Delores Butler.

In a nutshell, the prosecutor's theory was that on December 22, 1977 the Defendant came home from a period of incarceration in the Detroit House of Correction to find his home in a state of disarray. The Defendant was told that while he was gone his wife was sleeping with other men. The Defendant confronted the deceased with this information and then proceeded to viciously beat and kick her, causing her eventual death.

Thirty-one year old Herman Randle testified in his own behalf (III, pp. 93-122; IV, pp. 3-66). He testified that upon being told by his one-time friend, Ralph Weathington, that his wife had slept with his friend and everyone in the neighborhood (III, p. 105), he felt blown up inside and severely hit his wife in and about the face. The Defendant denied ever kicking his wife in the stomach and stated that she was drunk and stumbled down the staircase (III, pp. 112-113). His wife was alive with swollen eyes when he left her. The Defendant denied any previous convictions for any violent crime.

The medical examiner, George Russanow, stated that the cause of death was internal bleeding caused by a ruptured liver. The liver could have been ruptured by the fall down the flight of stairs (I, pp. 97-99, 101-105). The deceased's blood alcohol level was .17 (I, pp. 101, 102). The various contusions to the deceased's head were not the cause of her death (I, pp. 111, 112).

*The numbers in parentheses refer to the respective pages in the transcript of testimony taken in trial of this case.

The pertinent portions of the testimony and proceedings with respect to Defendant's appeal are set forth in his arguments below.

On July 28, 1978, Defendant was found guilty of second-degree murder (V, p. 20).

On August 11, 1978, he was sentenced to a natural life term of imprisonment (p. 4, Sentence Proceedings).

On April 29, 1979, the Court of Appeals, Judge N. J. Kaufman presiding, rendered its Opinion reversing Defendant's conviction and remanding for a new trial.

It is of significant import to note that the Court of Appeals only addressed itself to one of the five challenges raised on appeal by Defendant. Defendant Randle respectfully submits that the four remaining issues also warrant reversal and remand.

STATEMENT OF QUESTIONS PRESENTED

I. WAS THE ADMISSION OF A PHOTOGRAPH OF THE VICTIM LAYING ON A SLAB AT THE WAYNE COUNTY MORGUE REVERSIBLE ERROR?

The Court of Appeals did not address itself to this issue.
Defendant-Appellee submits the answer "Yes".

II. WAS THE DELIBERATE ADMISSION OF TESTIMONEY ACCUSING DEFENDANT ON A PREVIOUS OCCASION OF HITTING THE VICTIM IN HER STOMACH WHILE SHE WAS PREGNANT CAUSING HER TO LOSE A BABY, REVERSIBLE ERROR?

The Court of Appeals did not address itself to this issue.
Defendant-Appellee submits the answer "Yes".

III. DID THE ADMISSION OF POLICE TESTIMONY CONCERNING DEFENDANT'S SILENCE AT ARREST VIOLATE DEFENDANT'S RIGHT AGAINST SELF-INCRIMINATION, AND IS IT HARMLESS ERROR?

The Court of Appeals answered "Yes".
Defendant-Appellee submits the answer "Yes".

IV. MUST DEFENDANT'S SENTENCE BE VACATED WHERE THE RECORD AFFIRMATIVELY INDICATES THAT HE WAS GIVEN A MORE SEVERE SENTENCE FOR EXERCISING HIS RIGHT TO A JURY TRIAL?

The Court of Appeals did not address itself to this issue.
Defendant-Appellee submits the answer "Yes".

V. WAS THE PROSECUTOR'S CROSS-EXAMINATION OF DEFENDANT AS TO ALLEGED PRIOR INCONSISTENT STATEMENTS MADE TO THE POLICE REVERSIBLE ERROR?

The Court of Appeals did not address itself to this issue.
Defendant-Appellee submits the answer "Yes".

ARGUMENT I

THE ADMISSION OF A PHOTOGRAPH OF THE VICTIM LAYING ON A SLAB AT THE WAYNE COUNTY MORGUE WAS REVERSIBLE ERROR.

Defendant-appellant vigorously submits that pursuant to the criteria set forth by the Michigan Supreme Court in People v. Falkner, 389 Mich 682 (1973) and People v. Eddington, 387 Mich 551, 562-563 (1972), the trial court committed reversible error in allowing the admission of a close-up photo of the deceased's head laying on the slab at the Wayne County Morgue.

Defense counsel timely objected to the admission of the photograph as being inflammatory and merely calculated to excite passion and prejudice (I, pp. 85-87). The trial court was informed and the testimony of the medical examiner bore out that the deceased died from internal injuries to the body; specifically, hemorrhaging from a torn liver and not from the damage to the head or neck (I, pp. 97-99, 105). Further, defense counsel specifically informed the Court that the Defendant would testify that he struck the deceased about the head and face with his fist, that the Defendant had no intention to kill his wife and that the cause of death was due to the victim's stumbling down the stairs. The medical examiner conceded that it was possible that a fall down the stairs caused the ruptured liver (I, p. 101) and that the deceased's blood alcohol content was .17 (I, pp. 101, 102).

It is worthy to note that not only was Exhibit I, the close-up picture of the deceased's head on the morgue slab, admitted into evidence but also during the prosecutor's case-in-chief it was passed to each and every juror (I, p. 93).

Defendant submits that the use of this photograph was neither "substantially necessary nor instructive to show any facts or conditions in issue". People v. Eddington, supra. There was no other reason for the use of a morgue picture other than to excite passion and prejudice.

It is instructive to note that the depiction of blood inside the deceased's ear was so gruesome and distracting so as to cause the Court to question the doctor for a medical explanation. Significantly, the doctor told the Court that the blood was from superficial lacerations and not from any internal injuries (I, pp. 111-112).

The cause of death was hemorrhaging caused by a ruptured liver. The material fact in issue in the case at bar was whether Defendant inflicted the injuries to the deceased's torso or whether the internal injuries were caused by the deceased's accidental fall down the stairs. The admission of the close-up picture of the deceased's head and neck on the morgue slab was unnecessary and singularly calculated to excite the juror's passion and prejudice.

The Court in People v. Turner, 17 Mich App 123 (1969) properly noted that the admission of photographs of the victim is usually within the discretion of the Court and that pictures which depict the victim as left at scene by the assailant may sometimes help throw light on the issue of malice. In the instant case, as in Turner, supra, the photograph was the product of an intervening medical examiner.

The record fails to reveal the trial court's awareness that "photographs taken during an autopsy, however, must be subject to more careful scrutiny". Turner, supra at 133. There is nothing in the record to indicate that the pathologist needed the morgue photo to describe his findings or that the Court "required the prosecutor to exhaust alternative proofs prior to admitting the photographs". Turner, supra at 131.

"Having failed to require exhaustion of alternative proofs prior to admitting the photographs, the trial court abused its discretion". Judge (now Justice) T. G. Kavanagh, People v. Rogers, 14 Mich App 207 (1968).

ARGUMENT II

THE DELIBERATE ADMISSION OF TESTIMONY ACCUSING DEFENDANT ON A PREVIOUS OCCASION OF HITTING THE VICTIM IN HER STOMACH WHILE SHE WAS PREGNANT, CAUSING HER TO LOSE A BABY, WAS REVERSIBLE ERROR.

Under the guise of re-direct examination, the prosecutor deliberately brought on irrelevant and highly emotional testimony accusing Defendant on a previous unspecified occasion of striking the victim in her stomach while she was pregnant, causing her to lose a baby (VIII, pp. 12, 13).

Defendant totally denied Wethington's accusation (VIII, pp. 12, 13).

It cannot be gainsaid that the mere topic or insinuation of an abortion, whether it be voluntarily or involuntarily induced arouses one's emotions to the detriment of any calm and deliberate evaluation of the facts.

There was clearly no justification whatsoever for the prosecutor to elicit the emotional evidence alleging that the accused had previously hit the victim while pregnant in her stomach, ostensibly causing the death of her fetus. The prejudicial impact of this evidence clearly outweighed any assertion of its probative value.

Nor can it be said in good faith that the impact of this highly emotional irrelevant evidence was harmless beyond a reasonable doubt.

It is instructive to note that the prosecutor did not seek to justify the admission of this evidence under MCL 768.27 or MRE 404; nor did the trial court ever give the necessary cautionary instruction regarding the limited use of this evidence. Even applying the criteria set forth in People v. Oliphant, 399 Mich 472 (1976), Defendant submits that the prejudicial impact of this evidence clearly outweighed its probative value. Defendant did not deny striking the deceased. His defense was based on a two-

pronged claim of lack of causation, and the absence of any intent to kill.

Finally, Defendant submits that the recent decisions of this Court in People v. Rustin, 406 Mich 427 (1979) and its progeny acknowledges the prejudicial impact of allowing evidence of other previous uncharged crimes and that the prejudice is irreducible, notwithstanding any cautionary instructions.

ARGUMENT III

THE ADMISSION OF POLICE TESTIMONY CONCERNING DEFENDANT'S SILENCE AT ARREST VIOLATED DEFENDANT'S RIGHT AGAINST SELF-INCRIMINATION AND IS NOT HARMLESS ERROR.

Three Detroit Police Officers, Carl Parker, Fred Watkins and Raymond Smith testified as to perfecting the warrantless arrest of Defendant at an apartment located in Detroit (III, pp. 32-47). The prosecutor deliberately elicited testimony that after the Defendant was arrested and read his rights, he remained silent and did not even admit he was Herman Randle (III, pp. 34, 45).

Defendant asserts that the introduction of this testimony infringed upon his right against self-incrimination as guaranteed by the United States Constitution, Am. V, Const. 1963, Art. 1, §17, and the proscriptions set forth in People v. Bobo, 390 Mich 355 (1973).

Defendant testified as to his remorse and his lack of intent to kill his wife. His rendition of the events would be consistent with an acquittal of a manslaughter conviction. The reference to his silence was so offensive to the maintenance of a sound judicial process as to constitute reversible error. People v. Hoye, 80 Mich App 258 (1977) and People v. Hargrave, 74 Mich App 690 (1977). Secondly, it cannot be stated that there is "no reasonable possibility" the evidence of Defendant's silence at his arrest may not have convinced an otherwise undecided juror not to

draw inculpatory inferences in relation to Defendant's silence and his feeling of remorse or grief, and lack of intent to kill his wife. See People v. Swan, 56 Mich App 22, 33 (1974), especially in light of the prosecutor's deliberate emphasis to the jury in the closing argument that the Defendant remained silent and did not show any remorse at the time the police arrested him (IV, p. 86).

ARGUMENT IV

DEFENDANT'S SENTENCE MUST BE VACATED WHERE THE RECORD AFFIRMATIVELY INDICATES THAT HE WAS GIVEN A MORE SEVERE SENTENCE FOR EXERCISING HIS RIGHT TO A JURY TRIAL.

Perusal of the sentence transcript clearly reveals that the visiting judge imposed a life term of imprisonment because Defendant exercised his constitutional right to a jury trial and had refused to plea to the offense of manslaughter and accept a ten to fifteen year term of imprisonment:

> "THE COURT: Well, Mr. Randle, certainly, but this Court cannot take the position of jury. The jury you elected to have this matter tried before, twelve of your peers -- you were given an opportunity to enter a plea to the charge of manslaughter and you chose to not want to tell the Court what happened. I wasn't about to accept a plea without having facts stated on the record and you chose to go to trial.
>
> As far as I'm concerned, you suffered the consequences of your own decision. You had an opportunity. You were promised a sentence of ten to fifteen years if you pled to manslaughter and you decided not to take it. As far as I'm concerned, you had a trial before twelve of your local citizens and they found you guilty of second degree, the charge against you, and I read the report.
>
> As far as I'm concerned, you have been living off of the government for the last three or four years since you quit work."
>
> (pp. 3, 4, Sentence Proceedings).

To punish a person for exercising his right to a jury trial is a "due process violation of the most basic sort". See Bordenkircher v. Hayes, 434 US 357 (1978) and People v. Bottany, 43 Mich App 375 (1972).

The record certainly indicates the appearance, if not actual vindictiveness, against Defendant for not pleading guilty. Both Defendant's constitutional rights and the integrity of the judicial system mandate the vacation of his sentence and a re-sentence before an alternate judge. Cf. People v. Jones, 403 Mich 527 (1978), and In Re LeWallen, Cal Sup Ct., 24 Cr L 2458 (1979).

ARGUMENT V

THE PROSECUTOR'S CROSS-EXAMINATION OF DEFENDANT AS TO ALLEGED PRIOR INCONSISTENT STATEMENTS MADE TO THE POLICE WAS REVERSIBLE ERROR.

It was reversible error for the prosecutor to impeach the Defendant by two allegedly prior inconsistent statements made to the police without laying a proper foundation, without admission of the actual statements and, finally, without the required cautionary instruction.

Perusal of the record reveals that the prosecutor consistently questioned the Defendant with respect to whether he made two statements to the police and whether he had specifically told the police that he had not struck his wife with his fist (IV, pp. 37-40).

It is fundamental that before testimony is admissible as prior inconsistent statements, the proper foundation must be laid wherein the cross-examiner must identify the statement as to time, place and substance and ask the witness whether he made the statement. People v. King, 87 Mich App 163 (1978). The Defendant admitted to making prior statements but denied any inconsistency.

Significantly, the prosecutor was allowed to impeach the Defendant by informing the jury that the Defendant only told the police that he hit his wife with his "hand and slapped her", and failed to mention hitting her with his fist. The Defendant, in turn, questioned the prosecutor whether the prior statements contained this admission. The Defendant also stated that he was under the impression that his statements accurately indicated his

admission of striking her with his hand (IV, pp. 39-40). The prosecutor merely responded "Oh, I see" and failed to either seek admission of the alleged inconsistent statement while either questioning the Defendant or by calling the police officer who took the statement. Cf. People v. Dozier, 22 Mich App 528 (1970) for the rule that the prosecutor may call another witness to prove the prior inconsistent statement and People v. Plummer, 37 Mich App 657 (1972) for the requirement that the prior inconsistent statement must be offered in evidence.

In People v. Brown, 44 Mich App 402 (1973), the court held it to be reversible error because the prosecutor was allowed to refer to prior inconsistent testimony secured at a preliminary examination when the transcript of the prior testimony was not in evidence.

Finally, the record indicates that neither defense counsel nor the court gave the standard and fundamental limiting instruction that the prior statements could only be used for impeachment purposes and not as substantive evidence (MCJI 4:5:01).

Clearly, in the instant case, considering the nature of the defense theory, the admission of the alleged prior inconsistent statements wherein there was no mention of Defendant's hitting his wife with his fist, taken as substantive evidence, could most surely have significantly damaged Defendant's case.

A defendant is entitled to have a properly instructed jury, irrespective of a request for a limiting instruction. The likelihood of prejudice in the peculiar facts of the case at bar is manifest. It cannot be reasonably contested that one can posit beyond a reasonable doubt that, used substantively, this evidence of Defendant's prior inconsistent statement did not significantly affect the jury's fact finding. The integrity of the judicial process, the prevention of a miscarriage of justice and foremostly, the Defendant's right to a fair trial, mandates reversal. Cf. People v. Cox, 61 Mich App 37, 41 (1975).

RELIEF REQUESTED

Defendant-appellee prays that this Honorable Court deny Plaintiff-Appellant's Application for Leave to Appeal, and further, that the Court of Appeals Opinion reversing Defendant's conviction should be affirmed.

RESPECTFULLY SUBMITTED,

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DATED: May 19, 1980

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 80-548

THE PEOPLE OF THE STATE OF MICHIGAN,

Petitioner,

vs.

HERMAN RANDLE,

Respondent.

PROOF OF SERVICE

STATE OF MICHIGAN)
COUNTY OF OAKLAND) ss

Alvin C. Sallen, being first duly sworn, deposes and says that on the 31st day of December, 1980 he served a copy of Answer in Opposition to Petition for Writ of Certiorari to the Court of Appeals of the State of Michigan upon the following:

EDWARD REILLY WILSON, ESQ.
12th Floor, 1441 St. Antoine
Detroit, Michigan 48226

by enclosing same in an addressed envelope with first-class postage affixed thereto, and depositing said envelope in a United States Postal Box located at the Northland Towers, Southfield, Michigan.

Alvin C. Sallen (P23797)

Subscribed and sworn to before me
this 31st day of December, 1980.

Susan Diane Katz, Notary Public
Oakland County, Michigan
My Commission Expires: 10/9/83